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No. 79-1931

In the Supreme Court of the United States

OCTOBER TERM, 1979

DANNY BILL SANDER, a/k/a DANNY SANDER,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the examination of his attorney's file by local police officers requires dismissal of his federal indictment.

1. After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of obstructing interstate commerce by extortion, in violation of 18 U.S.C. 1951. He was sentenced to seven years' imprisonment. The court of appeals affirmed (Pet. App. 1a-11a).

The evidence at trial is recounted in the opinion of the court of appeals (Pet. App. 2a-6a). It showed that D&B Development acquired a six mile square tract of land in El Paso County, Texas, and commenced operations in June 1978 for both residential and nonresidential

development. In October 1978, the land was annexed by the City of El Paso, and the tract was rezoned for residential purposes only. The rezoning made it virtually impossible for D&B Development to continue its operations, on which it had already spent two or three million dollars.

D&B Development applied to the Zoning Board of Adjustment for a two year temporary use permit to permit it to continue operations. Petitioner contacted Richard Knapp, one of the partners at D&B Development, and offered to speak with members of the Zoning Board to resolve the problem. Knapp discussed petitioner's offer with his attorney, and then contacted the legal authorities, who instructed Knapp to place recorded telephone conversations to petitioner. During these conversations, petitioner told Knapp that for $10,000 he could ensure that D&B Development would receive two or three favorable votes from the Zoning Board. Knapp told him to go ahead.

After D&B Development received a favorable vote on the permit, petitioner spoke to Knapp and told him he might "get some grief down the line" if he did not pay the money. It was agreed that Knapp would leave the $10,000 in a brown envelope at his office for petitioner to collect. As petitioner was leaving Knapp's office carrying the envelope, he was arrested. After being advised of his rights, he told the officers that he was only the middleman in the scheme and was acting for compensation.

Prior to trial, petitioner moved unsuccessfully to dismiss his indictment because of alleged police intrusion into his relationship with his attorney. A hearing on the motion revealed that petitioner had retained the services of Lee Chagra to represent him on the extortion charge. Shortly thereafter, Chagra was murdered in his office. The El Paso police assumed custodial possession of Chagra's

office for the next five days to investigate the murder. Detective Lattimer of the El Paso Police Department testified that, in the course of interviewing Chagra's secretaries, petitioner's name came up as a possible suspect. Lattimer then glanced through petitioner's file looking for addresses and any connection to the murder. Petitioner testified that he had given Chagra a handwritten statement, but Lattimer testified that he had seen no such handwritten document and that a typewritten statement discovered in the file was left there and supplied to petitioner before his trial. Lattimer also testified that he did not discuss the contents of the file with any federal agents and that no evidence was supplied to the government by Lattimer. Nothing contained in Chagra's files was ever used by the prosecution in this case (Pet. App. 10a).

The court of appeals found that petitioner had made no showing of injury or prejudice because of the examination of the file. Thus it held that the district court properly denied petitioner's motion to dismiss (Pet. App. 11a).

2. Petitioner contends (Pet. 5-11) that the indictment should have been dismissed because of the conduct of the El Paso police officer in viewing his file in Chagra's office. Because nothing found in the file was supplied to the federal government or used in the prosecution, the court of appeals correctly determined that petitioner suffered no Sixth Amendment deprivation requiring the dismissal of his indictment. See *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977).[1] The general question whether dismissal of an

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[1]Petitioner does not dispute that no actual prejudice was shown. He suggests (Pet. 9-10), however, that he was deterred from taking the stand in his own behalf because he feared that the government possessed the handwritten statement, which the officer testified he had never seen and which the evidence clearly established could not have been in the hands of the prosecution. He does not suggest,

indictment can be an appropriate sanction for an interference with the attorney-client relationship that does not prejudice the accused in any way is presently before this Court in *United States* v. *Morrison*, cert. granted, No. 79-395 (June 30, 1980). We contend in *Morrison* that in the absence of prejudice, dismissal is never an appropriate sanction. Whatever the proper resolution of *Morrison*, however, dismissal of the indictment is not required in this case. Accordingly, it is unnecessary for the Court to hold this case pending its decision in *Morrison*.

In *Morrison*, DEA agents visited the defendant after she had been indicted on drug charges and had retained an attorney. They made disparaging remarks about her attorney and suggested that she obtain new counsel and consider cooperating with the government's investigation. The court of appeals held that the indictment should be dismissed because of "a deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial." 602 F. 2d 529, 533 (3d Cir. 1979). The court held that the rule of *Weatherford* v. *Bursey*, *supra*, rejecting dismissal of the indictment as an appropriate sanction, should be restricted to those situations "when there is *both* no prejudice to defendant's case *and* no wrongfully motivated intrusion into the attorney-client relationship." *Id.* at 532 (emphasis in original).[2]

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however, why this statement should have deterred him from testifying or what he could have said in his testimony that could possibly have affected the outcome of the trial.

[2]In *Weatherford*, an undercover agent had been present at a meeting between a defendant and his attorney, but had not advised the prosecution of the substance of the conversation.

The motivation for the police conduct in this case was not destruction or interference with the attorney-client relationship, and therefore even the *Morrison* court would not have called for dismissal of the indictment. The local officer's examination of petitioner's file was in accordance with the El Paso Police Department's long standing authorization from the district attorney's office to search anything on the premises where a murder has been committed for as long as necessary (Pet. App. 15a). The inspection of the file was in furtherance of the purpose of investigating the murder. The file was reviewed only after the police had received information from Chagra's secretary focusing suspicion on petitioner in the murder investigation. Moreover, the brief review was limited to finding clues in the murder investigation, and therefore nothing in the file was either copied or made available to federal authorities responsible for the instant extortion prosecution. Clearly, the intrusion was not occasioned by improperly motivated police misconduct aimed at interfering with petitioner's Sixth Amendment rights in connection with the extortion prosecution. Rather, this case is quite similar to *Weatherford*. A police action unrelated to the prosecution did result in an intrusion into the attorney-client relationship, but one from which the prosecution derived no information or benefit.

The inappropriateness of dismissal here is further highlighted by the fact that the conduct complained of was that of local police officers. No legitimate purpose, deterrent or otherwise, can be served by dismissing a federal indictment because of the unrelated conduct of

local police officers,[3] and nothing in *Morrison* suggests that dismissal is required where the alleged misconduct is not perpetrated by agents of the prosecuting authority.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[3]An inquiry into the events occurring in Chagra's office was undertaken by the State. A Texas court criticized the search, recommended that the district attorney's policy guidelines be revised, and referred the matter to the Office of the County Attorney to determine if criminal prosecution was warranted (Pet. App. 13a-19a). Thus, it is apparent that dismissal of the indictment here is not only an inappropriate way to deter future police misconduct, it is also unnecessary.

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